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In re Applications of)	MM Docket No. 93-88
EZ COMMUNICATIONS, INC.)	File No. BRH-910401C2
For Renewal of License of FM Radio)	
Station WBZZ(FM) on Channel 229B)	
at Pittsburgh, Pennsylvania)	
ALLEGHENY COMMUNICATIONS GROUP,)	File No. BPH-910628MC
INC.)	
For Construction Permit for)	
a New FM Broadcast Station on)	
Channel 229B at Pittsburgh,)	
Pennsylvania)	

To: The Commission

PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF ALLEGHENY COMMUNICATIONS GROUP, INC.

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Date: January 14, 1994

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SUMMARY

Allegheny Communications Group, Inc. is the comparatively superior applicant. It has a very substantial preference under the diversification criterion and a possible additional advantage under the integration criterion. The nonentertainment programming of EZ Communications, Inc. was minimal and scheduled at undesirable times. When EZ's egregious pattern of sexual discrimination and sexual harassment is taken into account, EZ may not receive any renewal expectancy credit. Allegheny is thus the superior applicant.

INDEX

	<u>Page</u>
I. <u>Preliminary Statement</u>	1
II. <u>Proposed Findings of Fact</u>	
A. <u>Applicant EZ Communications, Inc.</u>	2
B. <u>Applicant Allegheny Communications Group, Inc.</u>	3
C. <u>Diversification - EZ Communications, Inc.</u>	5
D. <u>Diversification - Allegheny Communications, Inc.</u>	8
E. <u>Integration of Ownership in Management - EZ Communications, Inc.</u>	8
F. <u>Integration of Ownership in Management - Allegheny Communications, Group, Inc.</u>	9
G. <u>Renewal Expectancy - Rule and Policy Compliance</u>	10
<u>In the Matter of Arbitration Between American Federation of Television and Radio Artists - Pittsburgh (AFTRA) and EZ Communications, Inc. - WBZZ-FM</u>	10
<u>EZ Communications, Inc., WBZZ-FM, Plaintiff vs. American Federation of Television and Radio Artists, U.S. District Court of Western District of PA</u>	26
H. <u>Renewal Expectancy - WBZZ Programming</u>	32
News	32
Public Affairs and Other Programs	33
I. <u>Auxiliary Power</u>	37

III. Proposed Conclusions of Law

- | | | |
|----|---|----|
| A. | <u>Diversification of Media</u> | 38 |
| B. | <u>Best Practicable Service</u> | 43 |
| C. | <u>Renewal Expectancy - Compliance with Rules of Policy</u> | 46 |
| D. | <u>Renewal Expectancy - WBZZ Programming</u> | 53 |

IV. Proposed Ultimate Conclusion and Decision 57

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To: Honorable Edward Luton
Administrative Law Judge

PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF ALLEGHENY COMMUNICATIONS GROUP, INC.

Allegheny Communications Group, Inc. (Allegheny), by counsel, hereby submits its Proposed Findings of Fact and Conclusions of Law in the above-captioned proceeding.

I. Preliminary Statement

The application of EZ Communications, Inc. for renewal of license of FM broadcast station WBZZ, Pittsburgh, PA and the mutually-exclusive application of Allegheny Communications Group, Inc. to operate a new FM broadcast station on the same frequency were designated for consolidated hearing by the Chief, Audio Services Division, Mass Media

Bureau in a Hearing Designation Order (DA93-361) released April 5, 1993, upon the following issues:

- (a) To determine which of the captioned mutually exclusive applications for authority to operate on Channel 229B at Pittsburgh, Pennsylvania would, on a comparative basis, best serve the public interest; and
- (b) To determine in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted.

Following discovery consisting of the production of documents and depositions and the exchange of written hearing exhibits, hearing sessions were conducted October 13, 19, 26, and 27, 1993.

II. Proposed Findings of Fact

A. Applicant EZ Communications, Inc.

1. EZ Communications, Inc. (EZ) owns all of the stock in Professional Broadcasting, Incorporated, which in turn owns all the stock of EZ Pittsburgh, Inc., a subsidiary which is now the licensee of FM broadcast station WBZZ, Pittsburgh, PA. EZ has two classes of common stock, Class A which has one vote per share and Class B which has ten votes per share. Following a recent public offering of EZ's Class A stock to the public, there were 6,102,297 shares of EZ Class A common

stock¹ and 2,777,897 shares of EZ Class B common stock outstanding. (Allegheny Ex. 27, P. 1, Tr. 337-340).

2. All of EZ's Class B stock is owned by EZ's chairman Arthur Kellar and its president Alan Box, either individually or jointly with their wives. Mr. Kellar controls 72.4% of all combined Class A and Class B votes, and Mr. Box controls 13.0% of that vote, for a total Kellar/Box voting control of 85.4%. Mr. Kellar and his son-in-law Mr. Box, both reside in Fairfax, Virginia, and neither have ever resided in Pittsburgh (Tr. 307, 336). The only person other than Messrs. Kellar and Box who owns 1% or more of EZ stock is Mr. James Draper of Winstead, CT, who owns 609,423 shares of Class A stock. (Allegheny Ex. 27, P. 2).

B. Applicant Allegheny Communications Group, Inc.

3. Allegheny Communications Group, Inc. (Allegheny) is a corporation formed in Delaware which has authorized one class of stock, consisting of 1,000 shares of common voting stock. The individuals who have subscribed to the stock in Allegheny are listed below as well as those persons who are the officers and the three directors in Allegheny:

¹ There were initially 5,902,927 Class A shares plus an additional 200,000 of such shares held by a brokerage firm (Tr. 339-340).

<u>Name of Subscriber</u>	<u>Number of Shares Sub- scribed To</u>	<u>Percentage of Votes and Ownership</u>	<u>Offices in Allegheny</u>
Mr. Herbert E. Long, Jr. 4603-B MacArthur Blvd. Washington, D.C. 20007	163	16.3%	President and a Director
Mr. Herbert E. Long, III 4603-B MacArthur Blvd. Washington, D.C. 20007	50	5.0%	Vice President
Ms. Lorraine H. Brown Penn's Landing Square 311 C South Second Street Philadelphia, PA 19106	150	15.0%	Secretary- Treasurer and a Director
Ms. Beatrice W. Welters 919 Saigon Road McLean, VA 22102	287	28.7%	Vice President and a Director
Ms. Diane J. Duggin 156 Three Ponds Lane Malvern, PA 19355	287	28.7%	-----
Mr. Eldridge Smith 307 Glen Echo Road Philadelphia, PA 19119	287	2.0%	-----
William E. and Hazel M. Floyd (Tenants by the Entirety) 322 Kerlin Street Chester, PA 19103	13	1.3%	-----
Ms. Alicia Perkins Coventry Court 707A S. 18th Street Philadelphia, PA 19146	13	1.3%	-----
Odessa and James Floyd, Sr. (Tenants by the Entirety) 11 W. Mowry Street Chester, PA 19013	13	1.3%	-----

<u>Name of Subscriber</u>	<u>Number of Shares Sub- scribed To</u>	<u>Percentage of Votes and Ownership</u>	<u>Offices in Allegheny</u>
Mr. William Thompson 719 E. 25th Street Chester, PA 19103	3	.3%	-----
Mr. Nicholas Perkins Coventry Court 707A S. 18th Street Philadelphia, PA 19146	<u>1</u>	<u>.1%</u>	-----
Total	1,000 shares	100.0%	

(Allegheny Ex. 1, Pp. 2-3)

C. Diversification-EZ Communications, Inc.

4. EZ, through Professional Broadcasting, Incorporated and the various other wholly-owned subsidiary corporations, is the owner of the following broadcast stations:

<u>Stations</u>	<u>Facility</u>	<u>City of License</u>
KRAK	AM-50KW, full time	Sacramento, CA
KRAK-FM	FM-Class B	Sacramento, CA
KQBR(FM)	FM-Class A	Davis (Sacramento), CA
KMPS	AM-5KW, full time	Seattle, WA
KMPS-FM	FM-Class C	Seattle, WA
KYKY (FM)	FM-Class C	St. Louis, MO
WBZZ (FM)	FM-Class B	Pittsburgh, PA
WIOQ (FM)	FM-Class B	Philadelphia, PA
WEZB (FM)	FM-Class C	New Orleans, LA
WMXC (FM)	FM-Class C	Charlotte, NC
WSOC-FM	FM-Class C	Charlotte, NC
KISP	AM-5KW, full time	Phoenix, AZ
KMXX (FM)	FM-Class C	Phoenix, AZ
WOKV	AM-10KW, full time	Jacksonville, FL
WKQL (FM)	FM-Class C	Jacksonville, FL
WHQT (FM)	FM-Class C	Miami, FL

The Phoenix, Jacksonville, and Miami stations were owned by EZ as of September 3, 1991, which was the cut-off date for amendments as a matter of right and thus are attributable to EZ although the stations were subsequently sold. (EZ Ex. 6, P. 1, Tr. 307-311).

5. On January 1, 1993, EZ commenced a time brokerage agreement with FM broadcast station WQKB, licensed to New Kensington, PA, which is a Pittsburgh suburb. The WQKB primary service (60dBu) contour is encompassed within the primary service contour of WBZZ. EZ employees produce 156 to 160 hours of WQKB programming per week, including all of the WQKB entertainment programming as well as the news programming broadcast over WQKB. EZ employees who program WQKB include a Program Director, who supervises a full-time news person, and six full-time and two part-time announcers. The WQKB Program Director reports to the WBZZ General Manager. An EZ employee serves as Promotion Director for WQKB. EZ markets WQKB, which includes five EZ employees who sell time on WQKB. The WBZZ general sales manager and the WBZZ local sales manager also supervise such time sales for WQKB. The WBZZ General Manager handles the national advertising for WQKB. EZ offers combination rates for advertisers who purchase time on WBZZ and WQKB. EZ employees who fill business administrative and traffic positions for WBZZ also provide such services for WQKB. The WQKB studios are in Millvale, at which location the

EZ employees who are the WQKB Program Director, Promotion Director, news person, and on-air entertainment announcers perform their duties. (Tr. 166-175, 177-181, 187-188, EZ. Ex. 12, Figure 1).

6. At the time EZ entered its time brokerage agreement the call letters of the New Kensington station were WMXP and its format was contemporary hit radio. WBZZ also has had for a number of years a contemporary hit radio format. Under the time brokerage agreement, the call letters of the station were changed to WQKB, and the format was changed to country. One of the factors motivating EZ to enter in the time brokerage agreement was to remove the format competition posed by the New Kensington station. This was accomplished by changing the format from contemporary hit radio to country. (Tr. 164, 313-314, 323).

7. Simultaneous with EZ entering into the time brokerage agreement, EZ also entered into a contract to purchase the New Kensington station.² Under the agreements, EZ pays the licensee of WQKB a fixed monthly payment of \$83,333.33, and eighty-five percent (85%) of such monthly payments applies to the purchase price of the station. EZ also assumed the lease for the majority of the studio space that the New Kensington station occupied. (Tr. 314, 316-318).

² The WBZZ/WQKB assignment application contains the showing required where one entity seeks to own two FM stations whose principal community contours overlap. (WBZZ Ex. 11, P. 1).

8. EZ has also entered into agreements to purchase two broadcast stations in St. Louis, MO, i.e. KUSA (AM, 5 Kilowatt full time) and KSD-FM, Class C. EZ also has local marketing agreements with KUSA and KSD-TV to provide a majority of the programming for these stations. (Tr. 311, 313, EZ Ex. 6, Pp. 1-2).

D. Diversification--Allegheny Communications Group, Inc.

9. Neither Allegheny nor any of its stockholders own any interest in any radio station or other media of mass communications. (Allegheny Ex. 1, P. 3).

E. Integration of Ownership in Management--EZ Communications, Inc.

10. Mr. Edward Meyer has been the General Manager of WBZZ since March, 1984, and a Vice-President of EZ since the fall of that year. Mr. Meyer owns 5,600 shares of EZ Class A common stock. Mr. Meyer typically devotes 55-60 hours per week to his job, of which 10 to 15 hours are devoted to supervision of EZ employees who work with WQKB. Prior to assuming his duties at WBZZ, Mr. Meyer had never lived in the Pittsburgh area. (Tr. 160-161, 176-177, EZ Ex. 10, P. 1). EZ principals Arthur Kellar and Alan Box exercise overall corporate supervision of WBZZ, with each devoting an average of about five hours per week to EZ's Pittsburgh operations. (EZ Ex. 8, Pp. 2-3 and Ex. 9, Pp. 2-3).

F. Integration of Ownership in Management--Allegheny Communications Group, Inc.

11. In the event of grant of Allegheny's application, Herbert E. Long, III will be the Business Manager of the proposed station, working that capacity full-time, i.e., a minimum of forty hours per week. To effectuate this commitment, Mr. Long will relocate his residence to Pittsburgh, PA. As Business Manager, he will supervise all financial aspects of the station's operation, including budget and financial planning, the sales and promotion staff, and the accounting staff. Mr. Long will also supervise the station's Equal Employment Opportunity Program. He will also advise and consult with the General Manager as to programming policies and decisions. Mr. Long is an African-American. He will resign any employment and discontinue or curtail any school or other activity as necessary in order to fulfill his full-time commitment to the station. (Allegheny Ex. 2, P. 2).

12. As President of the applicant corporation, Herbert E. Long, Jr. will devote time to general oversight in the construction, staffing, and operation of the station and while such time may be substantial, particularly in the initial phases of construction and operation, it is not believed that such time would average twenty hours per week over an extended period of time. (Allegheny Ex. 1, P. 3).

G. Renewal Expectancy--Rule and Policy Compliance

13. During the WBZZ renewal period (August 1, 1984-July 31, 1991) there occurred at WBZZ a case of sexual harassment and discrimination which led to a proceeding entitled In the Matter of Arbitration Between American Federation of Television and Radio Artists--Pittsburgh (AFTRA) and EZ Communications, Inc. WBZZ-FM (American Arbitration Association Case Number: 55-300-0064-88) decided November 16, 1988. The opinion and award of the Arbitrator is contained in the following paragraphs 14-40.

"ADMINISTRATIVE

14. "The undersigned Arbitrator, Ronald F. Talarico, Esquire, was mutually selected by the parties from a list supplied by the American Arbitration Association to hear and determine the issues herein. A hearing was held in Pittsburgh, Pennsylvania, on August 19, 1988, at which time the parties were given an opportunity to introduce documentary evidence and to examine and cross examine witnesses. Post-Hearing Briefs were submitted by both parties on November 2, 1988, at which time the record was closed. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

SCHEDULE 1 - ANNOUNCERS

* * *

B. Staff Working Conditions

* * *

15. The following provisions shall govern severance: each announcer shall receive a minimum of four weeks notice of termination of employment or four weeks salary in lieu of such notice. In addition, the following severance schedule shall apply:

3 - 6 months	2 weeks
6 - 12 months	4 weeks
1 - 2 years	6 weeks
2 - 3 years	8 weeks

Then one additional week's severance for each year of severance for each year of service. All payments in lieu of notice, severance pay, accumulated holiday or vacation pay shall be paid at the staff announcer's personal agreement rate if such announcer has a personal agreement calling for a salary higher than the minimum salaries herein. (Allegheny Ex. 3, Pp.4-5).

16. The Company may discharge staff announcers without notice or termination pay for flagrant neglect of duty, drunkenness, dishonesty or other serious cause. Any staff

announcer whose employment is terminated shall be entitled to payment for any compensating days off which he may have earned and not received.

* * * (Allegheny Ex. 3, P. 5).

17. Equal Opportunity

Both parties hereto affirm their intentions to continue to adhere to and support a policy which affords equal opportunity to qualified individuals regardless of their race, creed, color, national origin, age or sex. (Allegheny Ex. 3, P. 5).

BACKGROUND

18. The Employer, EZ Communications, Inc., owns and operates WBZZ, a Pittsburgh FM radio station, with offices located at 1715 Grandview Avenue, Pittsburgh, PA 15211. The grievant, Liz Randolph, has been employed by the Company since 1985 as its news director. Her duties include gathering and writing news, screening mail, taping the overnight news, dubbing a program called "Earth News", taping miscellaneous interviews and research. In addition, she also reads the news twice each hour during a morning radio show called "The Quinn and Banana Show", which features radio personalities Jim Quinn and Don Jefferson. (Allegheny Ex. 3, P. 5).

19. It has become common practice in today's radio industry for the news person, weather reporter, and even traffic reporter to engage in "banter" with the disc jockeys rather than just giving their various reports. The grievant alleges that, on a number of occasions, Quinn and Banana made lewd and derogatory comments about her during their radio program to the effect that she was sexually promiscuous, thereby causing her reputation to suffer in the Communications Industry and causing her emotional and physical pain and suffering.

20. The grievant's un rebutted testimony was that these comments first began in February, 1986 while she was on vacation on a Caribbean Cruise. Quinn and Banana stated during their program that she was on the "Love Bloat" and that she was having promiscuous sex with various people on the cruise ship. Apparently these and similar comments were made the entire time she was on vacation as an on-going topic for their brand of "humor". The grievant testified that upon return from vacation she called the Program Director at the radio station and told him she was upset over these outrageous and malicious statements. The grievant also indicated that she told the two disc jockeys of her anger at their statements. (Allegheny Ex. 3, P. 6).

21. The next on-the-air comments occurred in July, 1986 while the grievant was vacationing in Cape Cod, Massachusetts.

The grievant testified that upon her return, she heard from various friends who had listened to "The Quinn and Banana Show" that they indicated she was having sex with various people in Cape Cod. The grievant stated that she suffered a severe panic attack due to these comments and was taken to the hospital for tests. On-the-air comments, such as the following, apparently continued on a steady basis from July of 1986 to January of 1988, "suggesting" that she was a promiscuous person, that she was mentally unstable and had sexually transmitted diseases, that she was having sex with a number of the Pittsburgh Penguins as well as members of the U.S. Marine Corps, and the fact that she knows the hotline numbers for the Center for Disease Control by heart.

22. These comments/jokes apparently reached a breaking point for the grievant on January 22, 1988, during the "Friday Morning Joke-Off". This is a regular feature of the Quinn and Banana Show and is identified over the air as being a joke. During that segment of the program, a disc jockey from a station affiliated with WBZZ called in with a joke which used the grievant as the subject matter. His joke was recorded and then later broadcast during the "Joke-Off". It was not a spontaneous call from the audience, as the majority of the jokes are. The joke went as follows:

"My wife goes to the same hairdresser that Liz Randolph goes to."

"Oh, she does?"

"Yeah, she does."

"Did you know that Liz Randolph has a tattoo on her forehead?"

"Oh yeah, what does it say?"

"It says, 'Let go of my ears, I'm doing the best I can.'"

There is no question that this "joke" alludes to the performance of oral sex. (Allegheny Ex. 3, Pp. 6-8).

23. The grievant did not actually hear the joke as it was originally broadcast. Rather, one of the disc jockeys played a tape of it for her shortly afterwards, just several minutes before she was to read the news. Upon hearing the "joke", the grievant became extremely distraught and began shaking. She went looking for the program director but he had yet to arrive, so she left the station shortly thereafter. When the general manager, Mr. Tex Meyer, arrived a few minutes later, he heard bits and pieces of what had occurred and immediately began an investigation. He pulled Quinn and Banana off the air and met with them as well as his program director. Another disc jockey was brought in to finish their show. The grievant's two remaining news casts that morning were not aired. As soon as the grievant got home, she called

the station and attempted to contact the program director but he was not available. The grievant returned later that day to the station and wanted to resume her work. However, because of what had transpired, she was placed on leave of absence with pay until an investigation could be completed. (Allegheny Ex. 3, P. 8).

24. On January 27, 1988, a meeting was held with all parties. The grievant's employment was terminated on January 29, 1988, for flagrant neglect of duty. Her subsequent claim for severance pay was denied based upon the forfeiture language contained in Article 7 of Schedule I, thus giving rise to the within grievance. (Allegheny Ex. 3, Pp. 8-9).

ISSUE

25. Whether the actions of the grievant in leaving the radio station premises without completing her assigned duties constituted a flagrant neglect of duty which authorized the Company to withhold payment of severance pay? (Allegheny Ex. 3, P. 4).

POSITION OF THE EMPLOYER

26. It is a well settled principle of Arbitration Law that an employee who is confronted with a situation in his/her working environment which he/she believes to constitute a violation of the Collective Bargaining Agreement, is required

to carry out his/her work assignment and to turn to the grievance procedure for relief, rather than engaging in self help by walking off the job. Arbitrators have recognized that resorting to self help may be justified where adherence to work orders would result in a serious health hazard. The grievant made an obvious attempt to fit within the very narrow exception to the rule of perform now and grieve by offering the testimony of David B. Orbison, Ph.D. However, Dr. Orbison's testimony is highly questionable. First, he stated that he could not make a diagnosis of the grievant's condition. Second, the grievant had been treating with a psychiatrist for quite some time and Dr. Orbison never contacted him before issuing a report. Moreover, the psychiatrist, was not called to testify. The only information utilized by Dr. Orbison was transmitted to him by the grievant in a two hour interview "from her perspective". Dr. Orbison reviewed no medical records whatsoever. Finally, Dr. Orbison admitted that a diagnosis of a personality disorder cannot be made in one short interview. (Allegheny Ex. 3, Pp. 9-10).

27. Despite all of the above, the grievant asks the Arbitrator to accept Dr. Orbison's opinion that she was incapable of performing her duties on the morning of January 22, 1987. This is despite the fact that she was medically capable of announcing her intent to sue the Employer before leaving the premises, she was capable of calling the station

and advising she would have a statement for them later that day, she was capable of attempting to complete her duties later that afternoon. Moreover, she did not call her psychiatrist on January 22, 1987, to seek medical help as one might expect. Such facts are not uncommon in a situation where a terribly angry employee strikes out at her Employer in the heat of the moment only to realized later on that she has made a terrible mistake and tries to return to work. (Allegheny Ex. 3, P. 10).

28. All of the above facts lead to the conclusion that the grievant's condition from the morning of January 22, 1987, was not such that she was incapable of performing her duties. (Allegheny Ex. 3, P. 10).

29. In addition, the exception argument of the grievant should be rejected based upon the fact that it was two years in the making. The exception usually occurs when an Employer issues a directive to an employee which the employee believes would lead to a serious health hazard. The employee then, on the spur of the moment, refuses. In this matter, the grievant alleges violations of her rights causing emotional and physical harm dating back to February, 1986. The grievant had a 23 month period within which to file a formal grievance and have the matter resolved. She did not. Therefore, the grievant was not out of the blue placed in the position of

fear for her physical well-being which caused her to bolt from her duty station.

30. Finally, the grievant is involved in the entertainment business. The grievant is part of the entertainment vehicle and is involved in the interplay with the other on-air talent. The grievant knew of and accepted this role as evidenced by her testimony that in the past she willingly engaged in this banter, that at one time she showed up at the station in a very revealing outfit, and often made suggestions that she wanted to be nude. Thus, the instant dispute should be viewed in a context which differs substantially from the normal industrial work place environment. (Allegheny Ex. 3, Pp. 10-11).

POSITION OF THE UNION

31. The burden of proof is upon the Employer to establish that the grievant was terminated due to a flagrant neglect of duty. The only witness for the Employer was the general manager, Tex Meyer, whose explanation of the reason for the discharge falls far short of this heavy burden. Even if the Employer is believed to have met its burden, there is no question that the grievant's position must prevail due to the unconscionable, reckless, malicious, intolerable and outrageous actions towards the grievant which forced her actions of January 22, 1988. These actions were

communications uttered to the hundreds of thousands of listeners of WBZZ and implied that the grievant had engaged in indiscriminate oral sex with large numbers of persons; that she is promiscuous; has sexually transmittable diseases; and is an otherwise loose woman. The grievant testified that she forcefully communicated to the disc jockeys, to her program director and others of the terrible health consequences which these statements were causing her. Dr. David Orbison testified on behalf of the grievant that in his expert opinion that due to the outrageous actions of Quinn and Banana over the two year period from February 1986 to January 1988, she was experiencing an increasing deterioration in her self-esteem, that these actions caused her to suffer panic attacks and these panic attacks rendered her unable to perform her duties at WBZZ. The grievant's leaving the station on January 22, 1988, was caused by the malicious, unconscionable and outrageous actions of WBZZ's employees. It is difficult to imagine a more outrageous case of inhumane treatment towards an individual. (Allegheny Ex. 3, Pp. 11-12).

FINDINGS AND DISCUSSIONS

32. Because of the unique nature of the radio entertainment business and its dependency on ratings, the Employer must be accorded wide latitude in being able to change on short notice the format of its programming as well

as accompanying personnel in an effort to find a larger audience. Because of this, the Collective Bargaining Agreement permits the "termination" of announcers on a non-cause basis. In exchange for this ability to make personnel changes, the Employer has agreed to provide a minimum number of weeks of notice or the corresponding salary in lieu of such notice. However, an exception exists to this severance notice/pay in situations where the employee is guilty of flagrant neglect of duty, drunkenness, dishonesty or other serious cause. Under these circumstances, a staff announcer's employment may be terminated without the severance notice/pay.

33. The precipitating event in the within grievance was Ms. Randolph's leaving the radio station on the morning of January 22, 1988, without completing her final two on-air news reporting segments as well as other miscellaneous duties required that day. Arbitral law abhors such self help on the part of employees and dictates that under most circumstances, any dispute or disagreement an employee might have with his employer is to be processed through the grievance procedure. The obvious purpose of this rule is to prevent an employee's rash action from disrupting the Employer's business. Therefore, unless the grievant can prove the existence of some justifiable or mitigating circumstances that would permit her to avoid using the grievance process and resort to self-help by walking off the job, the Employer will have sustained its